INDEX

	Page
Opinions Below	1
Jurisdiction	2
Statute Involved	2
Questions Presented	2
Statement	3
Argument	10
Conclusion	15
Appendix	17

CASES CITED

Ashbacker Radio Corporation v. F.C.C., 326 U. S. 327 ..... 10, 13
C.A.B. v. State Airlines, 338 U. S. 572 ..... 11, 13, 14
National Coal Association v. F. P. C., 191 F. 2d 462 .. 6

STATUTES CITED

Natural Gas Act of 1938, 52 Stat. 821, as amended, 56 Stat. 83 (1942), 15 U.S.C. 717

Sec. 7(c) 10, 11
Sec. 7(f) 13, 14
Sec. 19(b) 2, 10

IN THE

Supreme Court of the United States

Nos. 70 and 172, October Term, 1952

Algonquin Gas Transmission Company and Texas Eastern Transmission Corporation, *Petitioners,*

v.

Northeastern Gas Transmission Company, Tennessee Gas Transmission Company, Federal Power Commission, Blackstone Valley Gas and Electric Company and Fall River Gas Works Company, *Respondents.*

Federal Power Commission, *Petitioner,*

v.

Northeastern Gas Transmission Company, et al., *Respondents.*

On Petitions for Writs of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR NORTHEASTERN GAS TRANSMISSION COMPANY, TENNESSEE GAS TRANSMISSION COMPANY, BLACKSTONE VALLEY GAS AND ELECTRIC COMPANY, AND FALL RIVER GAS WORKS COMPANY IN OPPOSITION.

Opinions Below.

The opinions and orders of the Federal Power Commission are as follows: order of August 4, 1950 (R. 81-83); Opinion No. 201, dated October 3, 1950 (R. 84-93); Opinion No. 202 and order dated November 4, 1950 (R. 94-133);

three (3) orders dated January 10, 1951 (R. 61-74, 75-78, 79-80); Opinion No. 206 and order dated February 26, 1951 (R. 134-184); and Opinion No. 208 and order dated March 1, 1951 (R. 185-210, 276-281).

The opinion of the United States Court of Appeals for the Third Circuit (R. 1571-1587) is reported at 195 F. 2d 872.

Jurisdiction.

The judgments of the Court of Appeals were entered on April 4, 1952 (R. 1587-1593). The petitions for certiorari were filed on May 17, 1952 and July 2, 1952. The jurisdiction of this Court is invoked under Section 19(b) of the Natural Gas Act (15 U.S.C. 717r(b)) and 28 U.S.C. 1254(1).

Statute Involved.

The pertinent provisions of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 56 Stat. 83 (1942), 15 U.S.C. 717 *et seq.* are set forth in the Appendix, *infra*, pp. 17-20.

Questions Presented.

Northeastern Gas Transmission Company (Northeastern) and Algonquin Gas Transmission Company (Algonquin) each applied for authority to bring natural gas to certain, but not all, of the distributing companies in Massachusetts, Connecticut and Rhode Island. In the consolidated proceedings on these applications, the Commission, in its first opinion, found that all of the distributing companies should be served by a single pipeline system since this would avoid the duplicate facilities and unnecessary costs of two systems. The Commission adhered to this view in its second opinion in which it authorized Northeastern to serve thirty-seven (37) of the companies and denied it authority to serve the other seventeen (17) companies covered by its application since the Commission found that the latter would be required to support "a project" to serve nine (9) compa[illegible]es not covered by such

application. Promptly thereafter, Northeastern filed an application to expand its facilities as thus authorized so that it could serve all of the companies through a single system and Northeastern requested that this application be consolidated with the hearings on Algonquin's application which were still pending. The Commission dismissed Northeastern's second application without a hearing—such dismissal being without prejudice to refiling in the event Algonquin's application were later denied. Upon the basis of such dismissal, the Commission terminated Northeastern's intervention in the then pending hearings on Algonquin's application, thereby denying Northeastern the opportunity to be heard in opposition to Algonquin's application, which the Commission thereafter granted. The questions are:

(1) Whether, as the lower court held, the Commission erred in denying Northeastern's second application without the hearing required by the Act?

(2) Whether, as the lower court held, Northeastern, *in any event*, was entitled to be heard as an intervenor in opposition to Algonquin's application?

Statement.

Northeastern filed an application on August 24, 1949 (R. 327a) which, as amended on March 2, 1950 (R. 442a), sought a certificate to construct and operate a pipeline to supply natural gas to forty-six (46) designated distributing companies in New England, which did not include the ten (10) companies in Massachusetts and Rhode Island which had executed contracts with Algonquin (R. 87, 413a).

Algonquin filed an application on January 24, 1950 (R. 409a) which, as amended on May 1, 1950 (R. 471a), sought a certificate to construct and operate a pipeline to supply natural gas to certain designated distributing companies in New England, which did not include twenty-two (22) of

the companies in Massachusetts and Rhode Island (R. 88).

During the first half of 1950, hearings were held on Northeastern's application in which Algonquin participated as an intervenor (R. 394a) and hearings were held on Algonquin's application in which Northeastern participated as an intervenor (R. 456a). The applications were then consolidated for hearing (R. 550a).[1]

The hearings on Northeastern's application having been completed, although the hearings on Algonquin's application were still pending, the Commission, upon motion of its staff counsel (R. 563a), waived the intermediate decision procedure with respect to "all the issues presented and matters involved" in the application of Northeastern and with respect to the issues presented and matters involved in Algonquin's application "to the extent *only* that Algonquin * * * *presently* proposes to supply natural gas to the communities and to the distributing companies *presently* proposed to be served by Northeastern" (R. 81-83). (Italics supplied.)[2]

Commission's Opinion No. 201.

After briefs had been filed, the Commission issued its first opinion (No. 201) in these matters, in which it found that "the public convenience and necessity requires adequate natural gas service" in the New England area (R. 86-87). The Commission then pointed out that Northeastern and Algonquin had each applied for authority to serve certain designated distributing companies and that neither had "requested a certificate authorizing service to the entire area;" that the two projects involved "extensive

[1] The proceedings before the Commission also involved the applications of Tennessee Gas Transmission Company (Tennessee) and Transcontinental Gas Pipe Line Corporation (Transcontinental) for authority to supply gas to Northeastern and the application of Texas Eastern Transmission Corporation (Texas Eastern) to supply gas to Algonquin and the application of United Gas Pipe Line Company (United) to supply such gas to Texas Eastern. These related applications are described in the opinion below (R. 1572-1573) and in the interest of simplicity this brief will discuss the issues in terms of the applications of Northeastern and Algonquin.

[2] Italics are supplied throughout this brief unless otherwise indicated.

and needless duplication and overlapping of facilities" and "would place an unjust and unnecessary financial burden upon the gas consumers in New England;" and that "the issuance of a certificate to either as applied for will render the other applicant's project infeasible" with the result that a part of New England would be deprived of natural gas (R. 87-89).[3] The Commission then suggested that the applicants "present to the Commission without delay a *proposal* based upon evidence now of record which will meet the public demand and need for natural gas in New England in the early future" (R. 90). While expressing the belief that "such a proposal can be submitted forthwith," the Commission stated that it was "prepared to reopen the record for supplementary evidence if necessary" (R. 90).

Five days later, on October 9, 1950, Northeastern submitted a "proposal" in which it requested that the Commission grant its then pending application on which hearings had been completed since August 5, 1950 and deny Algonquin's application (R. 627a)[4] Northeastern then stated that it would immediately, in a separate proceeding, undertake service to the entire area through its system which could be expanded at a minimum cost (R. 629a-630a).[5] While Opinion No. 201 did not require that the applicants submit a joint proposal,[6] Northeastern explained that it was unwilling to enter into any arrangement with

[3] In this connection the Commission listed the ten (10) distributing companies which were not covered by Northeastern's application because they had executed contracts with Algonquin and the twenty-two (22) distributing companies in Massachusetts and Rhode Island, as well as the five (5) companies in New Hampshire, which were not covered by Algonquin's application (R. 87-88).

[4] Denial of Algonquin's application would make the ten (10) distributing companies which had contracted with Algonquin available to Northeastern as potential customers.

[5] In such proposal Northeastern also suggested that the Commission establish the six New England states as its "service area" under Section 7(f) of the Act, although the Commission, as hereinafter shown, *infra*, pp. 13-14, has *never* made a "service area" determination in *any* proceeding.

[6] The Commission subsequently pointed out that Opinion No. 201 had afforded the applicants the opportunity to submit proposals either "jointly *or individually*" (R. 106).

Algonquin since it could not undertake the responsibility "for developing the New England natural gas market under the handicaps inherent in a divided corporate control where management will be dictated to or harassed by *divergent and competing fuel interests*". (R. 628a).[7] On the same day, October 9, 1950, Algonquin filed a supplement to its application in which it submitted two alternatives, including a request for authorization to serve the entire New England area (R. 632a).

Commission's Opinion No. 202.

Without any further proceedings, the Commission, a month later, on November 8, 1950, issued its second opinion (No. 202) and accompanying order (R. 94-133).

In said opinion the Commission adhered to its previously expressed views with respect to the greater desirability of a single pipeline system in New England (R. 111). The Commission then stated that "in view of the limitations upon our authority and the unquestioned desirability of providing service which can be rendered to some parts of the area in the near future," it had decided to authorize a portion of Northeastern's application on which hearings had been completed provided it could be assured that "*a project* to serve the remainder of the area is not thereby rendered infeasible" (R. 107). In so doing, the Commission pointed out (R. 109) that the record in the Algonquin proceeding "has not been closed and we cannot at this time take action with respect to Algonquin's application except as provided" in the order of August 4, 1950 waiving the intermediate decision procedure on that application to the extent only that such application covered distributing companies which were also covered by Northeastern's

[7] One of the three organizers of Algonquin and one of its principal stockholders is Eastern Gas and Fuel Associates (R. 475a, 479a) which is one of the nation's largest producers of bituminous coal for commercial purposes. The National Coal Association and United Mine Workers intervened in these matters (R. 75, 395a) "*opposing* the introduction of natural gas into New England" (R. 86). Cf. *National Coal Association* v. *F. P. C.*, 191 F. 2d 462.

application. The Commission then stated that the remaining markets—other than those which Northeastern was being authorized to serve—would assure an economically feasible project (R. 109). While the Commission also stated (R. 111) that it was "of the opinion" that these remaining markets "should be served by Algonquin" if Algonquin thereafter showed that it had an adequate supply of gas, the Commission did not state nor imply that Northeastern would be precluded from thereafter applying for authority to expand its facilities so that the entire New England area would be served by a single pipeline system. On the contrary, the Commission specifically stated (R. 107) that it was not "precluding the ultimate development of *a system* or systems better adapted to the requirements of New England than those proposed initially by either applicant."

Northeastern accordingly did not have any objection to the foregoing action and promptly advised the Commission that it acccepted the certificate which authorized it to serve thirty-seven (37) designated distributing companies, including one (Worcester Gas Light Company) which was not covered in its application (R. 645a).[8]

Hearings on Algonquin's application resumed on December 18, 1950 with Northeastern participating as an intervenor. In these hearings Algonquin introduced evidence substantially revising its previous estimates with respect to market requirements and gas supply (R. 161). The hearings were then recessed to resume on January 15, 1951 *without any limitation* as to the scope of the further hearings in which Northeastern planned to introduce evidence showing that Algonquin's application should be denied (R. 792a).

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[8] There was no indication that Northeastern, in accepting the certificate issued to it, would be thereby acquiescing in the future issuance of a certificate to Algonquin. Moreover, it is clear from the Commission's Opinion No. 202 that the sole purpose of the condition requiring Northeastern's acceptance of the certificate was to obtain Northeastern's agreement to establish interconnections and enter into agreements for the emergency interchange of gas with "*any* natural gas systems or systems serving the area at wholesale" (R. 111).